Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communication Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL ON THE FURTHER NOTICE OF PROPOSED RULEMAKING

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On the Comments:
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I. INTRODUCTION

On March 5, 2007, the Federal Communications Commission ("FCC") issued a Report and Order and Further Notice of Proposed Rulemaking ("NOPR") (MB Docket No. 05-311), soliciting comments on how it should implement Section 621(a)(1) of the Communications Act of 1934, as amended ("Act").[1] The FCC tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with local franchising authorities ("LFAs"). The FCC also notes that Section 611(a) states "A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use" and Section 622(a) provides "any cable operator may be required under the terms of any franchise to pay a franchise fee." The FCC states that these statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants.

Based upon this premise, the FCC asks for comment on the following issues:

- Should the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs?
- Does the FCC have the authority to implement this finding?
- What effect, if any, the findings in this *Order* have on most favored nation clauses that may be included in existing franchises?[2]

In the *Local Franchising NPRM,* the FCC also sought comment on whether customer service requirements should vary greatly from jurisdiction to jurisdiction.[3] In response, AT&T urged the FCC to adopt rules to prevent LFAs from imposing various data collection and related

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[1]/ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communication Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180 (released March 5, 2007) (hereinafter "*Order*").

[2]/ The FCC stated that it will conclude this rulemaking and release an order no later than six months after release of this *Order*.

[3]/ *Local Franchising NPRM*, 20 FCC Rcd at 18588.

requirements in exchange for a franchise.[4] AT&T also claimed that LFAs have imposed obligations that franchisees collect, track, and report customer service performance data for individual franchise areas.[5] AT&T further stated that it operates its call centers and systems on a region-wide basis, and that it is not currently possible or economically feasible for AT&T to comply with the various local customer service requirements on a franchise by franchise basis.[6] AT&T also asked that the FCC affirm that LFAs may not, absent the franchise applicant's consent, impose any local service quality standards that go beyond the requirements of duly enacted laws and ordinances.[7] The FCC also notes that Verizon indicates that some localities have conditioned the grant of a franchise upon the submission of Verizon's data services to local customer service regulation.[8]

NATOA opposed AT&T's request for relief from local customer service standards, and argues that the Act and the Commission's rules explicitly provide for local customer service regulation.[9] Specifically, NATOA asserted that Section 632(d)(2) of the Cable Act allows for the establishment and enforcement of local customer service laws that go beyond the federal standards.[10] Other parties asserted that customer service regulation is necessary to ensure that

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[4]/ AT&T Comments at 72-73.

[5]/ *Id.*

[6]/ *Id.* As discussed in Section III.C.2 of the *Order*, AT&T's existing call center regions do not mirror local franchise areas. One region can encompass multiple franchise areas, and impose a multitude of regulations upon a new entrant.

[7]/ AT&T Comments at 73.

[8]/ Verizon Comments at 75.

[9]/ NATOA Reply at 40-41. *See also* New York City Comments at 3 (citing 47 U.S.C. § 552).

[10]/ 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4).

consumers have regulatory relief.[11]

Section 632(d)(2) states that:

> [n]othing in this Section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission . . . . Nothing in this Title shall be construed to prevent the establishment and enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.[12]

In view foregoing, the FCC also asks for comment on the tentative conclusion concerning customer service requirements and state authority that:

- Under Section 632(d)(2), the FCC cannot preempt state or local customer service laws that exceed the Commission's standards, nor can the FCC prevent LFAs and cable operators from agreeing to more stringent standards.

Rate Counsel notes that various appeals are now pending among several circuits as to the validity of this *Order*. These appeals will be consolidated in one circuit. Rate Counsel shortly will file an appeal in the Third Circuit challenging the *Order*.

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[11]/ *See, e.g.,* Alliance for Public Technology Comments at 2-3; American Association of People with Disabilities at 2; Cavalier Comments at 6.

[12]/ 47 U.S.C. § 552(d)(2). *Accord* 47 C.F.R. § 76.309(b)(4).

II. INTEREST OF RATE COUNSEL IN THE INSTANT PROCEEDING

The Division of Rate Counsel is a department within the Department of the Public Advocate.[13] Rate Counsel is committed to fostering an environment that will benefit all cable customers through the development of a robust and competitive cable market. Such a market will provide consumers with the greatest number of choices at the lowest rates. However, Rate Counsel is also mindful of the important responsibilities granted to the local franchising authorities ("LFAs") by the federal legislation. The LFAs role is to balance the goal of a vibrant and competitive cable market with the need for proper oversight over entities that are granted the right to offer services in their franchise areas. Rate Counsel believes that this balance is important. Moreover, this balance is already provided for in current federal and state law, which grants the right to award cable

[13]/ Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Whitman's Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at N.J.S.A. 13:1D-1, et seq. The mission of the Ratepayer Advocate was to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that were just and nondiscriminatory. In addition, the Ratepayer Advocate worked to insure that all consumers were knowledgeable about the choices they had in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (N.J.S.A. §§ 52:27EE-1 et seq.). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings … as the Public Advocate deems shall best serve the public interest," N.J.S.A. § 52:"27EE-57, i.e., an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A.§52:27EE-12; The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

franchises to the LFAs. In the State of New Jersey, the New Jersey Board of Public Utilities ("Board") is the LFA. Rate Counsel participated below in the initial rulemaking.

III. DISCUSSION OF THE ISSUES

Rate Counsel submits that the FCC lacks jurisdiction over the award of initial franchise and as a result, they lack the authority to apply the rules adopted in this *Order* to incumbent cable operators as they negotiate renewals. Section 626 of the Act sets forth the congressional policy on what legal requirements are imposed on renewals.[14] Section 626 does not require that the LFA act on a renewal in a specific period of time. As a result, the FCC simply lacks the authority to change the statute. The imposition of time requirements found in the *Order* cannot override the expressed provisions of Section 626. In addition, with the *Order* and its various findings now under attack by various parties, the FCC is proceeding down a slippery sloop, to consider applying its findings to incumbent cable operators. If the *Order* is overturned in whole or in part – the appeals most likely will not be decided within six months- the results of any final rule adopted herein could be a nullity. On April 17, 2007, the Supreme Court issued a decision which cast further doubt on the FCC's conclusions about its authority to preempt LFAs contained in the *Order*. See *Linda A. Watters, Commissioner, Michigan Office of Insurance and Financial Services v. Wachovia Bank, N.A.*, et al, 2007 Lexis 4336. The likelihood that the *Order* will be vacated is even greater now. Rate Counsel recommends that the FCC stay this proceeding until the appeals are resolved. If the FCC declines to

[14]/ 47 U.S.C. § 546.

stay this proceeding, Rate Counsel asks that the FCC address the broader franchise and cable issues raised by Rate Counsel in the initial rulemaking.[15]

With respect to most favored nation clauses, such clauses are matters that rest with the LFA and the cable operator and should be dealt with by these parties. The FCC has no role to play in these purely local matters.

With respect to whether under Section 632(d)(2), Rate Counsel agrees with the FCC's tentative conclusion that it cannot preempt state or local customer service laws that exceed the Commission's standards, nor can the FCC prevent LFAs and cable operators from agreeing to more stringent standards.

The FCC Should Examine Other Important Issues With Regard to New Entrants and Cable Regulation

As noted above, the entrance of new participants in the cable television market, as well as the proliferation of new services by traditional cable operators, raises questions that need to be addressed within the framework of cable regulation, such as regulation of the Cable Programming Services ("CPS") tier by the states; the need for structural separation of video and non-video services; the appropriate allocation of costs between video and non-video services; the need to require the filing of Cost Allocation Manuals ("CAMs") by parties offering both video and non-video services; the need for cable operators to support upgrade costs through the filing for Form 1235; and other cost issues. These issues should be examined by the FCC. Rate Counsel raised these issues in the initial proceeding, but, the FCC failed even to mention or consider them in its *Order*.

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[15]/ See Comments of Rate Counsel (formally the Ratepayer Advocate) filed on February 10, 2006; Reply comments filed on March 28, 2006 and Rate Counsel's *Ex Parte* filed on June 2, 2006. Rate Counsel incorporates by reference these filings and asks that the FCC addresses these issues as part of this further proceeding.

The FCC should now expand this proceeding and address these issues. By addressing such issues, the FCC will foster the competitive marketplace that its says it desires with the attendant benefits to consumers.

IV. CONCLUSION

The FCC should stay this proceeding or in the alternative, expand this proceeding to address the issues identified by Rate Counsel as important to cable franchising and competition.

Respectfully submitted,

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